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Local lawyer helps Biden navigate uncharted waters



A weary M. Patrick Moore Jr. still hard at work at Biden campaign headquarters after pulling an all-nighter at the Iowa caucuses in January 2020

By Kris Olson

The 2020 presidential race had just begun, but Boston attorney M. Patrick Moore Jr. was sure he was witnessing what would be considered the campaign's weirdest moment.

The previous spring, Moore, associate counsel and advisor for presidential personnel in the Obama White House, had taken a call from a former colleague and agreed to join former Vice President Joe Biden's campaign as deputy general counsel.

Prior to heading to the White House, Moore, a partner at Hemenway & Barnes, worked as deputy counsel in the offices of both Gov. Deval L. Patrick and Gov. Charlie Baker, and he clerked for Supreme Judicial Court Justice Robert J. Cordy. Ironically enough, he had also clerked for President Trump's sister, Judge Maryanne Trump Barry of the 3rd U.S. Circuit Court of Appeals.

But on Feb. 3, 2020, he was ensconced in a Des Moines convention center with some 15 lawyers from the other Democratic campaigns and getting his first inkling of what would become a long wait for the eagerly anticipated first results of election season. At around 9:30 p.m., Moore and the other campaign lawyers were shuffled off to another room — and then left in the dark for nearly two hours.

Moore says the campaign was texting him, asking him what was going on, but he had no answers.

What Moore did not know yet was that the mobile app that election officials had planned to use to fetch Iowa caucus results had proven unusable, and the backup phone lines had gotten overwhelmed, too.

Nothing could top that debacle, right?

"It seems quaint now," Moore says.

The challenge of caucus night in Iowa would ultimately pale in comparison to the massive disruption the COVID-19 pandemic posed to the rest of the campaign, which culminated with the sitting president launching a barrage of baseless allegations of voter fraud that prompted not only dozens of lawsuits but ultimately a deadly assault on the Capitol as well.

In a recent interview with Lawyers Weekly, Moore reflected on his time on the trail and on the lessons that may extend into future, hopefully less tumultuous, election cycles.

A game changer

After Biden won a stunning, landslide victory in the South Carolina primary on Feb. 29, in what would become the turning point for his successful quest for the Democratic nomination, all eyes turned to what was scheduled to be three straight

"Super Tuesdays," with dozens of states set to vote on March 3, 10 or 17.

Among the states voting on March 3 was Texas.

"Texas was the first place we saw that older poll workers called in sick, or just did not show as they were starting to be uncomfortable about the reports of the pandemic," Moore says.

Precincts were forced to close, and lines grew long at the polling places that remained open.

A week later, March 10, was the last day that the campaign staff was together in person, Moore notes. "I flew back from Philadelphia that day after that March 10 primary, and I remember taking a picture, because I was one of three people on the plane," he says.

Litigation soon followed.

First up was Ohio, where Republican Gov. Mike DeWine lent his support to a legal effort to try to postpone the election.

That legal challenge failed, and as of 8 p.m. or so the night before the election, it looked like voting would have to be held as scheduled.

"If, God forbid, [Trump] got one sympathetic judge to buy into what was being argued, it would be a serious headache for us."

—M. Patrick Moore Jr.

But then, around 9 p.m., the Ohio commissioner of public health issued an order, closing all of the state's polling places, an order that the Ohio Supreme Court upheld at 2 a.m. The Legislature then rescheduled the primary for April 28.

"That was the first coming to a head of, how is voting going to work in the pandemic?" Moore recalls. "We did not have an appreciation at that point that this would be with us to the extent that it was in the fall."

The issues were even thornier in neighboring swing state Wisconsin, which was scheduled to vote on April 7.

An added complication was that state law required another person witness the signing of absentee ballots, a procedure that became perilous with the arrival of the coronavirus.

Once again, there was uncertainty as to whether voting would be held up until the 11th hour. But then the U.S. Supreme Court reversed much of the relief that a U.S. District Court had granted and the 7th U.S. Circuit Court of Appeals had upheld.

Wisconsin Democratic Gov. Tony Evers also

tried to postpone the election by executive order, but the state Supreme Court struck that down, and voting went on as scheduled.

Biden's victory in Wisconsin essentially secured him the Democratic nomination, as his main competitor, Vermont Sen. Bernie Sanders, withdrew from the race the next day.

But perhaps more importantly, Wisconsin also foretold the changes that states would have to make quickly to ensure that things went more smoothly in November.

The expected sharp increase in people voting absentee or by mail figured to put a strain on election administrators from coast to coast, and that's before even considering the fact that the sitting president was laying the groundwork to not concede defeat, putting those same administrators in the crosshairs — in some cases, almost literally.

System holds

To the great relief of many, the Nov. 3 election went smoothly.

"Just imagine if the pressure that Trump put on post-election was put on a system that functioned the way it did in the spring," Moore says.

The real heroes were local officials of both parties, who "almost uniformly came together and figured out these problems," according to Moore.

"I think people forget what it looked like in the spring, in terms of how difficult it would be to pull [the election] off," Moore says. "It's no small part of the reason why these results held on in the face of the challenge" from Trump.

Moore and his colleagues buttressed that effort by local election officials. He agrees with the suggestion that the most serious legal challenge, both pre- and post-election, centered on the state of Pennsylvania.

Part of what was litigated pre-election in Pennsylvania was a decision by the state Supreme Court to extend by three days the deadline to return mail-in ballots, which had previously been 8 p.m. on election night.

The Republican Party asked the U.S. Supreme Court for a stay of that aspect of the state court's decision and almost got it, the court deadlocking at 4-4 prior to the confirmation of Justice Amy Coney Barrett.

The Republican argument essentially mirrored the argument that Chief Justice William Rehnquist had made in his concurring opinion in *Bush v. Gore*: that state legislatures have the sole authority to declare state election law, not subject to state constitutional requirements as they are interpreted by the state supreme court, Moore explains.

"I think that is a radical argument and not an argument that is at all consistent with federalism, the type of thing that you typically hear from the Republican Party of Pennsylvania," Moore says. "But it is an argument that has some adherents on the Supreme Court."

With the status of ballots that would arrive after Election Day but within the three-day window in doubt, the campaign knew it would be money well spent to try to minimize the number of ballots that would ultimately be challenged.

The campaign's public education efforts were successful, Moore was happy to report. Extrapolating from the primary, the campaign had estimated that more than 100,000 mail-in ballots would arrive after Election Day, but within the three-day window.

However, the number turned out to be only 10,000, not enough to change the result in Pennsylvania.

"The determining factor in all of the post-election legal challenges was that the election wasn't close at the end of the day, period," Moore summarizes. "Had it been super close in particular states, it may have looked different."

Truth and consequences

While the Trump campaign had Jones Day to represent it in those credible legal challenges, there have also been more dubious ones, led by former New York Mayor Rudy Giuliani and attorneys L. Lin Wood and Sidney Powell.

Moore says he and the legal team had no choice but to take those frivolous lawsuits seriously, too. For one thing, Trump's Twitter account was still active at that point, and he would amplify even the smallest victory.

"If, God forbid, he got one sympathetic judge to buy into what was being argued, it would be a serious headache for us," Moore says.

The strategy was to treat the claims like a good government lawyer might treat a pro se challenge to a policy, he explains.

In a Massachusetts federal court, Giuliani and crew might have had to "stand back from the fire that was going to come from the bench," Moore says.

Moore says he was initially confused when that didn't happen.

"Then I realized that the courts just wanted to let these folks punch themselves out," he says.

As for whether Giuliani and the others should be sanctioned or lose their law licenses, Moore says he will leave that to others to decide.

But he adds that if "you are undercutting our democracy and doing it in a specious fashion, you're not only violating your responsibility of candor to the court, but you're also basically trying to take a jackhammer at the foundation on which the court rests."

In 2016, Russian actors had used social media to influence voters, and Biden's legal team anticipated that such an issue might resurface. While it may not have, part of the reason is that there was no need, as domestic actors adopted the template the Russians had created, Moore notes.

"Increasingly people don't have local newspapers," Moore says. "Tens of millions of people get their news from social media sources. When you did that during the election campaign, you read lies about our candidate. When you did that after the election, you read lies about our democracy."

Only the deadly events of Jan. 6 at the Capitol may have jolted social media companies into starting to meet their corporate responsibilities, Moore notes.

Even though his candidate was victorious, Moore will not be returning to the White House, fulfilling a pledge he had made to his family. Instead, he will happily ramp back up his practice as a litigator and appellate lawyer, which dwindled to billing fewer than 10 hours a month during the campaign's home stretch, and election law will be part of that.

Nonetheless, Moore admits it is "bittersweet" seeing some of his friends return to Washington to take on the challenge of the mess Trump left behind and jump start long-languishing initiatives.

"The scope of that is just more than I have words to describe," he says.